

No. 22-15260

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE ESTATE OF ISABELLA “BELLA” HERNDON, et al.

Plaintiffs-Appellants,

vs.

NETFLIX, INC.

Defendant-Appellee.

Appeal From The United States District Court,
Northern District of California, Case No. 4:21-cv-06561-YGR,
Hon. Yvonne Gonzalez Rogers

APPELLEE NETFLIX, INC.’S REPLY IN SUPPORT OF MOTION TO STRIKE
APPELLANTS’ RESPONSE WITH RESPECT TO THE MOTION OF
PROPOSED AMICUS CURIAE FIRE ET AL.

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On June 22, 2023, Appellants filed a 16-page, 3,341-word brief stating they “do not oppose” Professor Eugene Volokh’s motion for leave to file an amicus brief. Dkt. No. 72, at 16 (emphasis in original). On June 27, 2023, Netflix filed a three-page motion to strike that brief. Dkt. No. 73. Netflix explained that, under the Federal Rules of Appellate Procedure and this Circuit’s Rule, Appellants’ non-opposition to Prof. Volokh’s motion for leave to file that amicus brief mooted the need for any substantive briefing on the motion for leave; that Appellants’ lengthy brief improperly included more than 3,000 words of argument that Appellants should make, if at all, in their merits reply brief; and that the “non-opposition” should thus be stricken.

Appellants have responded to Netflix’s three-page motion with a 15-page, 3,158-word response. Dkt. 78. Despite that length, Appellants do not respond to the argument Netflix made in its motion that Appellants’ non-opposition to Prof. Volokh’s motion for leave means this Court does not even have to “consider” his motion before accepting the amicus brief for filing. *See* Fed. R. App. Pro. 29(a); Circ. Adv. Comm. Note to Rule 29-2 (under Fed. R. App. Pro. Rule 29(a) and Circ. Rule 29-2, “[o]btaining such consent [of all parties to the filing of the brief]

relieves the Court of the need to consider a motion.”); Dkt. 73 at 2-3 (citing these rules). That alone shows that this motion to strike should be granted.¹

Despite failing to engage with the central premise of Netflix’s motion, Appellants argue at length that their non-opposition cannot have improperly provided argument that belongs in their reply because it does not expressly cite the Answering Brief. *See generally* Dkt. 78. As Netflix explained in its motion and Appellants again ignore, Appellants’ 7,000-word reply is where they may reply to both the Answering Brief and to any amicus filed in support of Netflix. Dkt. No. 73 at 1. Instead, Appellants invented a “relevance” dispute, and then used that supposed dispute as an excuse to file thousands of words regarding what Appellants contend are “the central facts and legal claims of this case.” Dkt. 78 at 12. A statement of non-opposition to a motion for leave to file an amicus brief is not the place to make such arguments.

Regrettably, this is not the first time Netflix has had to respond to filings by Appellants that fail to comply with the applicable rules regarding limitations on

¹ Incredibly, Appellants fault Prof. Volokh for not filing a reply after Appellants said they had no opposition to his motion for leave. Dkt. 78 at 4. Plaintiffs also make the implausible assertion that they were not being discourteous in not responding to Prof. Volokh’s pre-motion request for consent, but instead “were in the midst of emailing” him with their response. Dkt. 78 at 2 n.1. As Netflix observed, and Appellants do not dispute, Prof. Volokh waited for *10 days* for Appellants to respond before filing his motion for leave. Dkt. 73 at 2; *see also* Dkt. 64-1 ¶ 1.

briefing. *See* Dkt. No. 34 (Appellee Netflix, Inc.’s Opposition To Appellants’ Motion For Leave To Exceed The Type-Volume Limitations For The Opening Brief); Dkt. No. 36 (Appellee Netflix, Inc.’s Motion To Strike Corrected Dkt. 31); *see also* Dkt. No. 38 (Order Denying Appellants’ Motion To File An Oversized Brief).

Finally, Netflix notes that Appellants have included in their most recent filing ad hominem attacks on Netflix’s counsel, as Appellants have done repeatedly in filings in this Court and the district court. Netflix believes that court rules are important, and that they should apply to represented parties equally in every case. Appellants’ use of that uncontroversial position as a springboard for an ad hominem attack does a disservice to the Court and the standards of professional conduct.

DATED: July 25, 2023

Respectfully submitted,
MUNGER, TOLLES & OLSON LLP

By: /s/ Blanca F. Young
BLANCA F. YOUNG
Attorneys for Appellee NETFLIX, INC.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: July 25, 2023

Respectfully submitted,

By: /s/ Blanca F. Young

BLANCA F. YOUNG

CERTIFICATE OF SERVICE

I, Blanca F. Young, hereby certify that on this 25th day of July, 2023,
copies of the foregoing APPELLEE NETFLIX, INC.'S REPLY IN SUPPORT OF
MOTION TO STRIKE APPELLANTS' RESPONSE WITH RESPECT TO THE
MOTION OF PROPOSED AMICUS CURIAE FIRE ET AL. was served via U.S.

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